FIRA DEVELOPMENT SDN. BHD.

v.

GOLDWIN SDN. BHD.

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
MOHD. AZMI SCJ
WAN HAMZAH SCJ
[CIVIL APPEAL NO. 173 OF 1987]
26 OCTOBER 1988

CIVIL PROCEDURE: *Judgment in default - Application for leave to enter appearance to set aside judgment and to stay execution - Delay in application as parties were negotiating settlement.*

The respondents and appellants had entered into an agreement on 11 June 1982 where the respondents had agreed to build for the appellants 24 units of double-storey terrace houses in lot 3405 at Mukim of Assam Kumbang, Perak for RM1,762,000. The houses were erected and completed.

The respondents alleged that the parties had on 3 July 1985 agreed that the appellants would pay the respondents interest on the balance still unpaid from 1 November 1983 at 1.5% per month until full payment.

The respondents claimed that the appellants owed RM135,964.22 being balance of contract price and interest. 3 cheques totalling RM25,000, given by the appellants to the respondents as part payment were dishonoured. The respondents sued the appellants and the summons were said to have been served on the appellants on 8 November 1985. The respondents obtained judgment in default on 7 January 1986 when no appearance was entered by the appellants.

The appellants by summons in chambers dated 21 March 1986 sought leave to enter appearance and to set aside the judgment in default and to stay execution. The application was dismissed with costs by the learned Judge on 23 October 1987. The appellants contended that service was bad hence they did not enter appearance and that the delay in filing the application was because the parties were negotiating a settlement.

The learned Judge in rejecting the explanation, stated that it was not necessary to consider the merit of the case since the appellants were not able to satisfy the Court with the reasons for the delay in application and failure to enter appearance. The appellants appealed to the Supreme Court.

Held:

[1] Where an application is made for setting aside a judgment in default the learned Judge would have to consider the merits of the case.

[2] Where judgment is entered on failure of a defendant to take procedural steps laid down under the Rules of the High Court 1980, the Court has an absolute discretion to set aside a judgment, if necessary, on terms and allow the case to be heard on the merits.

[3] As to delay, there is no rigid rule that an applicant must satisfy that there is a reasonable explanation only when judgment was allowed to go by default. The reason for allowing the judgment and thereafter applying to set it aside is one of the matters to which the Court will have regard in exercising its discretion. The application should be made promptly and within a reasonable time but the Court will in a fit case disregard lapse of time.

[Appeal allowed with costs.]

Cases referred to:
Evans v. Bartlam [1937] AC 473
Bank Bumiputra Malaysia Bhd. v. Majlis Amanah Ra'ayat [1979] 1 MLJ 23
Farden v. Richter [1889] 23 QBD 124
White v. Weston [1968] 2 QB 647
L.Oppenheim & Company v. Mahomed Haneef [1922] 1 AC 482
Beale v. MacGregor [1886] 2 TLR 311

Other sources referred to:
Mallal's Supreme Court Practice, 2nd Edn., Vol. I, p. 84

For the appellants - Darshan Singh; M/s. Darshan Singh & Co.
For the respondents - Roshan Kumar; M/s. Ng Yook Woon

JUDGMENT

Lee Hun Hoe CJ (Borneo):

We allowed the appeal with costs here and the Court below. We stated we would give our reasons later. We do so now.

On 11 June 1982 the plaintiffs and the defendants entered into an agreement whereby the plaintiffs agreed to build for the defendants 26 units of double-storey terrace houses and 29 units of single-storey terrace houses in Lot No. 3405 at Mukim of Assam Kumbong, Perak for RM1,762,000. The plaintiffs erected and completed all the houses. The plaintiffs alleged as follows. On 3 July 1985, the parties agreed that the defendants would pay the plaintiffs interest on the balance still remaining unpaid from 1 November 1983 at 1.5% per month until payment in full of the balance. The plaintiffs claimed that the defendants owed RM135,964.22 being balance of contract price and interest. In part payment of the above sum the defendants give the plaintiffs three cheques totalling RM25,000. These cheques when presented were dishonoured. The plaintiffs sued the defendants. The summons were said to be served on the defendants on 8 November 1985. No appearance having been entered by the defendants the plaintiffs went on to obtain judgment in default on 7 January 1986. By summons in chambers dated 21 March 1986 the defendants sought leave to enter appearance and to set aside the judgment in default and to stay execution.

On 23 October 1987 the learned Judge dismissed the application with costs. The defendants contended that the service was bad hence they did not enter appearance. They also explained that the delay in filing of the application was because the parties were negotiating a settlement. All these were rejected by the learned Judge. However, the learned Judge stated that it was not necessary for him to consider the merit of the case, if any, since the defendants were not able to satisfy the Court with the reason for the delay in making this application and the reason for the failure to enter appearance.

We are unable to agree with the reasoning of the learned Judge. First, where an application is made for setting aside a judgment in default the learned Judge would have to consider the merits of the case.

The defendants alleged as follows. There were disputed issues between the parties. Hence they tried to settle these by negotiation. The completion date of the project was 15 September 1982. But, because of delay on the plaintiff's part in completing the project the defendants had to pay RM81,201.46 to over 30 purchasers. Also, the defendants had to pay RM150,000 for defects in the scheme which the plaintiffs failed to remedy. The defendants claimed to have a good defence and a good counterclaim.

Where judgment is entered on the failure of a defendant to take any of the procedural steps laid down under the Rules of the High Court 1980, the Court has an absolute discretion to set aside the judgment, if necessary, on terms and allow the case to be heard on the merits. Lord Atkin stated clearly the principles in which the Court should act in *Evans v. Bartlam* [1937] AC 473 at 480 in these words:

> ... The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

In the instant case the learned Judge did not consider the judgment to be irregular. *Mallal's Supreme Court Practice*, 2nd Edn., Vol. I at p. 84 explains the position where the judgment is regular thus:

> The discretion will only be exercised if the affidavit supporting the application to set aside discloses facts showing a defence on the merits, or for some very sufficient reason: *Bank Bumiputra Malaysia Bhd. v. Majlis Amanah Ra'ayat* [1979] 1 MLJ 23; *Farden v. Richter* [1889] 23 QBD 124.

A defence on the merits means merely raising only an arguable or triable issue, e.g. contributory negligence in a running down case in *White v. Weston* [1968] 2 QB 647. A judgment in default is not a judgment on the merits: *L. Oppenheim And Company v. Mahomed Haneef* [1922] 1 AC 482.

As to delay there is no rigid rule that an applicant must satisfy Court that there is a reasonable explanation only when judgment was allowed to go by default. Obviously, the reason, if any, for allowing the judgment and thereafter applying to set it aside is one of the matters to which the Court will have regard in exercising discretion. Clearly, the application should be made promptly and within a reasonable time. But the Court will in a fit case disregard lapse of time: *Beale v. MacGregor* [1886] 2 T.L.R. 311.

Also found at [1989] 1 CLJ 1